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When Christianity Was Part of the Common Law

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Nineteenth-century American judges and lawyers often claimed that Christianity was part of the common law. From Kent and Story in the early part of the century, to Cooley and Tiedeman toward the end, the maxim that "Christianity is part and parcel of the common law" (or some variant thereof) was heard so often that later commentators could refer to it as a matter "decided over and over again," one which "[t]ext writers have reiterated and courts have affirmed." The maxim even received an endorsement of sorts from the Supreme Court, which in 1844 affirmed that "the Christian religion is part of the common law of Pennsylvania."[1]

This notion would have few adherents today. No state supreme court has held that Christianity is part of the common law since 1927, when the Pennsylvania Supreme Court cited the maxim en route to barring the Philadelphia A's from playing Sunday baseball. No court of any kind has relied on the maxim since a 1955 Pennsylvania Superior Court decision affirming a conviction for making "persistent lewd, immoral and filthy" telephone calls.[2] And cases like these are rarities. Apart from such occasional flareups, the doctrine died out around the turn of the century. Twentieth-century judges and lawyers have only rarely stated that Christianity is *not* part of the common law; more often, they simply let the maxim fade into disuse.

This article seeks to understand what the maxim actually meant to lawyers and judges in the nineteenth century and to explain why it faded away. The

1. *In re Granger,* 7 Phila. Rep. 350, 355 (1870); Arthur William Barber, "Christianity and the Common Law," *The Green Bag* 14 (1902): 267; *Vidal v. Philadelphia,* 43 U.S. 127, 198 (1844).

2. *Commonwealth ex rel.* [sic] *v. American Baseball Club of Philadelphia,* 290 Pa. 136, 143 (1927); *Commonwealth v. Mochan,* 177 Pa. Super. 454, 458 (for the maxim), 459 (for the phrase quoted) (1955).

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issue was present in some high-profile cases in the nineteenth century and was the subject of ardent debate among well-known nineteenth-century American lawyers. These days, it is a dark, barely explored corner of legal history. The countless books and articles written about the historical relationship between law and religion contain scarcely any mention of the issue.

In the few instances when historians *have* mentioned it, much of what they have said has been incorrect. Perry Miller, for instance, suggests that lawyers advanced the theory that Christianity is part of the common law to assure skeptical nonlawyers that law was not so technical as to be amoral. In addition, he believes that the issue was put to rest by the Supreme Court's 1844 decision in *Vidal v. Philadelphia.* Mark DeWolfe Howe claims that many cases were "controlled" by the maxim and that it "permitted the transformation of Christian principles into rules of law." Merrill Peterson asserts that the maxim was "the legal cornerstone" of a larger "conservative theory" of the relationship between church and state. He adds that Thomas Jefferson was the maxim's only "authoritative" opponent. The evidence presented in this article will show the error in such statements.[3]

Even when historians are not factually incorrect, they treat the subject as ammunition for modern-day Establishment Clause battles. There is less attention to understanding what the maxim meant in the nineteenth century. On the one side, James McClellan uses Story's views on the issue primarily as a tool with which to argue that "[t]hrough an extraordinary accumulation of broad interpretations and historical misrepresentations," the post–World War II Supreme Court has "fabricated a constitutional doctrine nationalizing the Bill of Rights." On the other side, Leonard Levy discusses a few celebrated cases involving the maxim in order to criticize nineteenth-century judges for according insufficient weight to freedom of conscience. Kurt Lash does the same for the purpose of arguing that the Establishment Clause is today correctly interpreted to limit the power of the states as well as the federal government.[4]

3. Perry Miller, *The Life of the Mind in America* (New York: Harcourt, Brace & World, 1965), 186–203; Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965), 28, 30; Merrill D. Peterson, *The Jefferson Image in the American Mind* (New York: Oxford University Press, 1960), 95. Bradley Chilton argues that the maxim gained currency in seventeenth-century England because of "the ability of seventeenth-century elites to control the printing and dissemination of law books." See "Cliobernetics, Christianity, and the Common Law," *Law Library Journal* 83 (1991): 355, 360. Jayson Spiegel summarizes a few of the important cases discussing the maxim in "Christianity as Part of the Common Law," *North Carolina Central Law Journal* 14 (1984): 494.

4. James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* (Norman: University of Oklahoma Press, 1971), 152 (for the quoted language), 118–59 (for the issue generally); Leonard W. Levy, *Blasphemy* (New York: Knopf, 1993), 400–23; Kurt T. Lash, "The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle," *Arizona State Law Journal* 27 (1995): 1085, 1100–11.

Neither stance is conducive to understanding what the maxim meant to people in the nineteenth century or why it ceased to exist.

That is a shame, because the maxim's rise and fall provides an unusually clear view of a transformation in the profession's conception of the common law, a fundamental change that is ordinarily obscured by the rhetoric of legal writing—the shift from a common law *discovered* by judges to a common law *made* by judges. By taking a close look at the origin, the uses, and the decline of the notion that Christianity is part of the common law, we gain some insight into the development of the modern understanding of the common law.

After a brief discussion of the doctrine's origin, Part I considers the function of the doctrine—the sorts of cases in which it was used, the role it played in determining the outcome of cases, and so on. Part II canvasses the arguments for and against the doctrine and traces changes in those arguments over time. This is an attempt to account for the maxim's demise by situating it in the context of larger changes in conventional thought about law over the course of the nineteenth century. Part III suggests some more general conclusions about the nature of this and similar debates.

I. Origins and Uses of the Maxim

The earliest recorded suggestion that Christianity is part of the common law appears in the 1676 English prosecution of John Taylor "for uttering of divers blasphemous expressions, horrible to hear, (viz.) that Jesus Christ was a bastard, a whoremaster, religion was a cheat; and that he feared neither God, the devil, or man." In rebutting an implicit doubt as to the court's jurisdiction—does a secular court have the authority to punish a blasphemer?—Hale provided a verbal formula that would be remembered much longer than the case itself. "[S]uch kind of wicked blasphemous words," he observed, "were not only an offense to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court." This was so, Hale explained, because "Christianity is parcel of the laws of England."[5]

The only thing new about *Taylor's Case* was the phrasing of this maxim. Blasphemy had already been prosecuted several times as an offense at common law.[6] It was not unusual to equate political and religious principle; at John Lilburne's 1649 treason trial, for instance, the court noted that "the law of England is the law of God" and then, in case there was any doubt, added that "the law of God is the law of England." As Holdsworth suggests, the "maxim

5. *Taylor's Case,* 1 Vent. 293, 86 Eng. Rep. 189 (K.B. 1676).

6. There were at least seven such prosecutions in secular courts before Taylor's. G. D. Nokes, *A History of the Crime of Blasphemy* (London: Sweet & Maxwell, 1928), 147. Before these, English blasphemy prosecutions were in ecclesiastical courts. Ibid., 2–20.

would, from the earliest times, have been accepted as almost self-evident by English lawyers."[7]

The doctrine itself was nothing new. But there must have been something in Hale's formulation of it that caught the imagination of readers because his maxim began popping up in subsequent opinions. When the author of two early eighteenth-century obscene books—"the one stil'd, The Nun in her Smock; the other, The Art of Flogging"—argued that obscenity was not a crime at common law, the King's Bench cited *Taylor* in support of the proposition that "religion was part of the common law." In *Rex v. Woolston,* another blasphemy prosecution, Chief Justice Raymond acknowledged his debt to Hale after observing that "Christianity in general is parcel of the common law of England." Chancellor Hardwicke pointed out two decades later that, because "the Christian religion . . . is a part of the law of the land, which is so laid down by Lord *Hale* and Lord *Raymond,*" a Jewish testator could not be permitted to leave money for the teaching of Judaism. Thus, by the time Blackstone sat down to write his *Commentaries,* it took no great imagination to explain why blasphemy was a common law crime. Citing *Taylor* and *Woolston,* but without any further discussion, Blackstone quietly noted that "christianity is part of the laws of England."[8]

The ubiquity of Blackstone's *Commentaries* in late eighteenth-century North America ensured that the maxim would gain currency among American lawyers as well. Those who attended James Wilson's lectures at the College of Philadelphia in the early 1790s learned that "[p]rofaneness and blasphemy are offenses, punishable by fine and imprisonment," because "Christianity is a part of the common law." A few years later, Zephaniah Swift likewise cited Blackstone as support for the proposition that blasphemy is a common law crime.[9]

7. *A Complete Collection of State-Trials and Proceedings upon High-Treason and other Crimes and Misdemeanours; from the Reign of King Richard II to the Reign of King George II,* 3d ed. (London: John Walthoe, 1742), vol. 2, 28, 36; W. S. Holdworth, *A History of English Law* (Boston: Little, Brown, 1926), vol. 8, 403, n. 5.

8. *The King v. Curl,* 1 Barn. K.B. 29, 94 Eng. Rep. 20 (K.B. 1727); *Rex v. Woolston,* Fitzg. 64, 94 Eng. Rep. 655 (K.B. 1729); *De Costa v. De Paz,* 2 Swans. 532, 36 Eng. Rep. 715 (Ch. 1754); William Blackstone, *Commentaries on the Laws of England,* vol. 4 (1769; reprint, London: Dawsons, 1966), 59. For later English history, see Hypatia Bradlaugh Bonner, *Penalties Upon Opinion* (London: Watts & Co., 1912); Courtney Kenny, "The Evolution of the Law of Blasphemy," *Cambridge Law Journal* 1 (1922): 127.

9. *The Works of James Wilson,* ed. J. D. Andrews (Chicago: Callaghan & Co., 1896), vol. 2, 425 (the published version of Wilson's lectures cites Blackstone and *Rex v. Woolston*); Zephaniah Swift, *A System of the Laws of the State of Connecticut* (Windham: John Byrne, 1795), vol. 2, 321. In the first American edition of Blackstone, St. George Tucker suggested that blasphemy, "as a *civil* offense, seems to have been abolished" in Virginia by the state's Bill of Rights, but Tucker did not disagree with the broader notion that Christianity is part of the law. St. George Tucker, *Blackstone's Commentaries* (1803; microfiche reprint, Littleton, Colo: F. B. Rothman, 1969), vol. 5, 59, n. 9.

The maxim's transplantation from England became complete in *People v. Ruggles* (1811), when the New York Supreme Court, in an opinion by James Kent, affirmed a conviction of common law blasphemy for the statement that "Jesus Christ was a bastard, and his mother must be a whore." Kent began with a brief discussion of *Taylor, Woolston,* and Blackstone to demonstrate that blasphemy was a common law crime in England because "christianity was parcel of the law." The only question remaining for the New York courts, therefore, was whether the doctrine was part of the law of New York as well. No reason of policy suggested the contrary:

> And why should not the language contained in the indictment be still an offence with us? There is nothing in our manners or institutions which has prevented the application or the necessity of this part of the common law. We stand equally in need, now as formerly, of all that moral discipline, and of those principles of virtue, which help to bind society together.[10]

Nor had the maxim been superseded by any homemade law. Although New York's constitution guaranteed "the free exercise and enjoyment of religious profession and worship, without discrimination or preference," the common law could hardly ignore the empirical truth that Christianity was the dominant religion in New York. The state was not, Kent explained,

> bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of *Mahomet* or of the grand *Lama;* and for this plain reason, that the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those impostors.

As a result, in New York as in England, "Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law."[11]

Ruggles was the first reported American decision to discuss whether or not Christianity would be part of the developing American common law. Largely on the strength of *Ruggles,* Christianity was soon recognized as part of the common law by courts in Pennsylvania, Delaware, South Carolina, Arkansas, Tennessee, North Carolina, and Alabama.[12] Treatise writers repeated the max-

10. *People v. Ruggles,* 8 Johns. 290, 293 (N.Y. 1811). This point had been a staple of Kent's lectures for some time. See James Kent, *Dissertations: Being the Preliminary Part of a Course of Law Lectures* (1795; reprint, Littleton, Colo.: F. B. Rothman, 1991), 24.

11. *N.Y. Const. of 1777,* art. 38; *Ruggles,* 8 Johns. at 295 (emphasis in original), 297. This is not to say, of course, that most New Yorkers were churchgoers or otherwise participated in institutional religious life. See Jon Butler, *Awash in a Sea of Faith: Christianizing the American People* (Cambridge: Harvard University Press, 1990).

12. *Updegraph v. Commonwealth,* 11 Serg. & Rawle 394 (Pa. 1824); *State v. Chandler,* 2 Del. (2 Harr.) 553 (Del. 1837); *City Council of Charleston v. Benjamin,* 33 S.C.L. (2 Strob.)

im, citing these cases as support.[13] By the end of the century, an American writer could correctly assert that "the proposition, that Christianity is a part of the common law, is supported by the very highest judicial authority both in England and in this country."[14] But what exactly did that mean?

A. Blasphemy

The maxim was initially invoked in blasphemy prosecutions, either (as in *Ruggles*) to justify a common law prohibition of blasphemy or to provide a background for the interpretation of a criminal blasphemy statute. By the nineteenth century, however, prosecutions for blasphemy were extraordinarily rare. Thus, by the time American courts adopted a rhetoric justifying prosecution for religious dissent, it was too late to make much of a difference.[15]

Even in the seventeenth century, when the rate of North American blasphemy prosecutions was at its highest, prosecutions for blasphemy were unusual. At the peak, Leonard Levy has counted eleven cases in the 1660s, six in the 1670s, and six more in the 1680s, nearly all in New England. In most of these cases, a statute criminalizing blasphemy was at the bottom of the case, or at least would have been had anyone thought to raise the issue. In Massachusetts, for instance, blasphemy was a capital crime under the Body of Liberties of 1641 and under the Laws and Liberties of 1672. It became punishable by a variety of alternative lesser sentences (including "boaring throrow the Tongue, with a red hot Iron") in 1697.[16] A handful of seventeenth-century blasphemy prose-

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508 (1846); *Shover v. State,* 10 Ark. 259 (1850); *Bell v. State,* 31 Tenn. 41 (1851); *Melvin v. Easley,* 52 N.C. 378 (1860); *Goree v. State,* 71 Ala. 7 (1881).

13. Nathan Dane, *A General Abridgment and Digest of American Law* (Boston: Cummings, Hilliard & Co., 1823), vol. 6, 667, 675; Joseph Story, "Christianity a Part of the Common Law," *The American Jurist* 9 (1833): 346; Theodore Sedgwick, *A Treatise on the Rules which Govern the Interpretation and Application of Statutory and Constitutional Law* (New York: J. S. Voorhies, 1857), 17; Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little, Brown, 1868), 472; Fortunatus Dwarris, *A General Treatise on Statutes,* ed. Platt Potter (Albany: W. Gould & Sons, 1871), 559; Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States* (St. Louis: F. H. Thomas Law Book Co., 1886), 167.

14. P. Emory Aldrich, "The Christian Religion and the Common Law," *American Antiquarian Society Proceedings* 6 (April 1889): 18, 33–34.

15. On the status of blasphemy in the United States in the late eighteenth and early nineteenth centuries, see Chester James Antieau, Arthur T. Downey, and Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (Milwaukee: Bruce Publishing, 1964), 184–87.

16. Levy, *Blasphemy,* 260–61; *Body of Liberties,* sect. 94(3) (1641); *The General Laws and Liberties of the Massachusetts Colony* 14 (1672); *Massachusetts Province Laws 1692–1699,* ed. John D. Cushing (Wilmington: Michael Glazier, 1978), 115.

cutions proceeded without any statutory basis, a circumstance that apparently caused no more controversy in the colonies than in England.

In the eighteenth century, the rate of blasphemy prosecutions slowed to a trickle; Levy has identified only ten prosecutions in the entire century, spread over seven colonies/states, all of which had statutes prohibiting blasphemy.[17] Thus, even if eighteenth-century American criminal defendants had been disposed to question whether blasphemy was punishable at common law, no opportunities presented themselves.

Blasphemy prosecutions were even more unusual in the nineteenth century, but they became more controversial for two reasons. First, nearly every state had a constitutional provision concerning the relationship of church and state, so defendants had a plausible argument that what was once considered blasphemy was now protected by the constitution. Second, nearly every state had a reception statute adopting only so much of the common law as suited the state's situation; defendants could now claim that the common law status of blasphemy in England did not necessarily resolve the issue at home. *Ruggles* was the first reported blasphemy case in this new atmosphere. Thus, it provided the first occasion to discuss these issues.

In *Ruggles,* Kent was careful to confine the common law offense of blasphemy to "maliciously reviling God, or religion." As he explained, *any* "words and actions, dangerous to the public welfare" could be prosecuted at common law, whether or not they concerned religion. "[L]icentious, wanton, and impious attacks upon christianity" are criminal, not because religion receives special protection by the state, but because such criticism is "inconsistent with the peace and safety." Thus, "[t]he free, equal, and undisturbed, enjoyment of religious opinion, whatever it may be, and free and decent discussion on any religious subject, is granted and secured." In Kent's view, therefore, merely questioning the truth of Christian doctrine, in a reasoned manner, did not constitute common law blasphemy. It was a crime only "to revile with malicious and blasphemous contempt, the religion professed by almost the whole community."[18] This distinction explains why intemperate attacks on Christianity could be illegal while similar attacks on Islam could not. Because the common law was concerned only with the possibility that words would cause a breach of the peace, a common law judge had to anticipate the effect those

17. Levy, *Blasphemy,* 264–67. The decline in blasphemy prosecutions was part of a broader decline in the prosecution of religion-based offenses. See A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680–1810* (Chapel Hill: University of North Carolina Press, 1981), 187–88; Hendrik Hartog, "The Public Law of a County Court: Judicial Government in Eighteenth-Century Massachusetts," *American Journal of Legal History* 20 (1976): 299–308; William E. Nelson, "Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective," *New York University Law Review* 42 (1967): 450–66.

18. *Ruggles,* 8 Johns. at 293, 296, 295.

words would have on listeners. In the New York of 1811, a judge could reasonably fear that an allegation that "Jesus Christ was a bastard" might lead to an outbreak of violence. An identical allegation about Mohammed, on the other hand, was much less likely to cause a breach of the peace, simply because there were few (if any) Moslems to get angry.

Despite Kent's care, *Ruggles* appears to have been widely misunderstood by the politicians of New York. The legislature quickly removed much of the decision's practical effect with "An Act for suppressing Immorality," which made blasphemy a statutory crime.[19] At the New York Constitutional Convention of 1821, a delegate proposed a provision specifically to overrule *Ruggles;* the relevant part read: "The judiciary shall not declare any particular religion, to be the law of the land." The delegate wished instead "for freedom of conscience. Where that existed, true religion would flourish."

Kent was on hand to explain himself. "The court had never declared or adjudged that christianity was a religion established by law," he noted. "They had only decided that to revile the author of christianity in a blasphemous manner, and with a malicious intent, was an offence against public morals, and indictable." Blasphemy was thus "indictable on the same principle as the act of wantonly going naked, or committing impure and indecent acts in the public streets. It was not because christianity was established by law, but because christianity was in fact the religion of this country."[20] Kent's explanation evidently satisfied the convention because the proposed provision did not make it into the state's new constitution.

In the next couple of decades, two other state supreme courts invoked the notion of Christianity as part of the common law to affirm convictions of blasphemy. But both courts, after some flights of language containing the maxim, were as careful as Kent to specify its limits. In *Updegraph v. Commonwealth,* the Pennsylvania Supreme Court began by announcing that "Christianity, general Christianity, is and always has been a part of the common law of Pennsylvania." Because nothing in the state constitution changed that fact, the court observed, there was no constitutional barrier to criminal prosecution for speech claiming that "the Holy Scriptures were a mere fable, that they were a contradiction." But the court emphasized the difference between religious dissent, which could not be made criminal, and blasphemy. "[N]o author or printer," the court concluded, "who fairly and conscientiously promulgates the opinions with whose truths he is impressed, for the benefit of others, is answerable as a crim-

19. *Laws of the State of New-York,* vol. 2, 195 (1813). Blasphemy had earlier been criminalized by a statute of 1708, *The Colonial Laws of New York,* vol. 1, 617 (1894), a statute which by 1813 had either been repealed or forgotten. (New York's colonial statutes that had not been repealed or amended remained in effect until 1828. Ibid. at vii.)

20. *Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New-York,* 462–63 (1821).

inal." It was only a mean-spirited attack on Christianity, for the purpose of disturbing the listener rather than expressing the speaker's honest belief, that constituted blasphemy. A "malicious and mischievous intention is, in such a case, the broad boundary between right and wrong." As in *Ruggles,* an attempt "to produce disorder" was a crime regardless of how the attempt was carried out, whether through the advocacy of lawlessness or the advocacy of irreligion.[21]

The Delaware Supreme Court arrived at the same result by the same route. The court began its opinion in *State v. Chandler* with a discussion of *Ruggles* and *Updegraph* for the purpose of demonstrating that Christianity was a part of the common law. But the court quickly qualified that assertion. "It was never pretended," the court explained, "that the common law punished the violation of every precept of christianity. No judge at common law ever decided, that he who did not do unto others as we would that they should do unto him . . . was therefore liable to penalty." Christianity was part of the common law only to the extent that malicious criticism of its doctrines constituted blasphemy, and even that was true only because Christianity was the prevailing religion among the residents of Delaware. "If in Delaware the people should adopt the Jewish or Mahometan religion," the court concluded, "this court is bound to notice it as their religion, and to respect it accordingly," by construing the common law to prohibit malicious attacks on Jewish or Moslem doctrine.[22]

Thus, in this line of blasphemy cases, the maxim proved to have little actual bite. Christianity was part of the common law only in the sense that criticism of Christianity, for the purpose of causing a breach of the peace, was punishable as blasphemy. The maxim was less a rule of law than an empirical description of a category of speech that a later generation would call "fighting words." Christianity was part of the nineteenth-century American common law only because nineteenth-century judges predicted that many would be upset, to the point of violence, to hear Jesus Christ called a bastard and his mother a whore.

Even when conceding the maxim's truth, later judges were often careful to limit it to this single circumstance. Chief Justice John Gibson of Pennsylvania observed, only a few years after *Updegraph,* that Christianity is part of the common law only to the extent that "the feelings of its professors [are] guarded against insult from reviling or scoffing at its doctrines. . . . But further the law does not protect it." When the United States Supreme Court had to interpret Pennsylvania law in *Vidal,* Justice Story read *Updegraph* the same way: "[W]e are compelled to admit that although Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." In New York, the judges were even more explicit:

21. 11 Serg. & Rawle at 400, 398, 403, 405–6.
22. 2 Del. (2 Harr.) at 555–56, 562, 567–69.

> The maxim that Christianity is part and parcel of the common law has been frequently repeated by judges and text writers, but few have chosen to examine its truth or attempt to explain its meaning. [The maxim's] true and only sense [is] that the law will not permit the essential truths of revealed religion to be ridiculed and reviled. In other words, that blasphemy is an indictable offence at common law. The truth of the maxim in this very partial and limited sense may be admitted. But if we attempt to extend its application, we shall find ourselves obliged to confess that it is unmeaning or untrue.[23]

By the second half of the century, the treatises that covered the subject likewise often insisted that the maxim was nothing more than an ornate way of stating that blasphemy was punishable at common law. Sedgwick, for instance, explained: "It is often said that Christianity is part and parcel of the common law; but this is true only in a modified sense. Blasphemy is an indictable offense at common law."[24]

Even within this limited domain, the maxim was hardly a necessary component of the result. As a way of justifying the illegality of blasphemy at common law, it was entirely vacuous. As Kent and the other judges took care to explain, the common law punished all breaches of the peace, whether or not they concerned religion. Malicious criticism of Christianity was just one way of breaching the peace. Blasphemy, as defined in these cases, thus would have been a crime at common law with or without the aid of the maxim. The Pennsylvania Supreme Court recognized as much in *Updegraph:* "even if Christianity was not part of the law of the land, it is the popular religion of the country, an insult on which would be indictable, as directly tending to disturb the public peace." A century later, in affirming one of the last blasphemy convictions in the United States, the Maine Supreme Court was able to reach the same conclusion, that blasphemy is a common law crime, without ever addressing whether Christianity is part of the common law.[25]

The maxim's irrelevance can also be seen in prosecutions for a related crime, obscenity. In two nineteenth-century cases, courts cited the maxim as support for the proposition that uttering obscene words in public is a common law offense. Yet in two other cases, courts recognized "profane swearing" as a common law crime, for the same reason—the tendency toward breach of the

23. *Harvey v. Boies,* 1 Pen. & W. 12 (1829); *Vidal v. Philadelphia,* 43 U.S. 127, 198 (1844); *Andrew v. The New York Bible and Common Prayer Book Society,* 6 N.Y. Super. 156, 182 (1850). See also *Lindenmuller v. People,* 33 Barb. 548, 560 (1861) (maxim true only "in a qualified sense," that blasphemy may be punished by state).

24. Sedgwick, *Statutory and Constitutional Law,* 17. For similar discussions, see Dwarris, *A General Treatise,* 559; Thomas M. Cooley, *Blackstone's Commentaries,* 2d ed. (Chicago: Callaghan, 1872), vol. 2, 331–32, n. 7; Tiedeman, *Limitations of Police Power,* 167–70.

25. *Updegraph,* 11 Serg. & Rawle at 399; *State v. Mockus,* 120 Me. 84 (1921).

peace—but without any discussion of the maxim.[26] Thus, in the interpretation of blasphemy and obscenity as common law crimes, it served no function.

The maxim was equally functionless, in the lawyer's sense, as a guide to the constitutionality of blasphemy statutes. The argument in *Ruggles, Updegraph,* and *Chandler* rested on a two-step variant of originalism that is still familiar in other contexts today: (1) Christianity was part of the common law before the constitution was written; and (2) the drafters of the religion clauses showed no intention to change that.[27] The argument would have worked equally well with a narrower step (1), for instance that blasphemy was punishable at common law before the constitution was written. This was in fact the strategy adopted by Lemuel Shaw in the most famous of the early nineteenth-century blasphemy cases, *Commonwealth v. Kneeland.*[28] In affirming Abner Kneeland's conviction of blasphemy against the allegation that Massachusetts's blasphemy statute was inconsistent with the state constitution, Shaw avoided any discussion of whether Christianity was part of the common law. He simply noted that blasphemy had been a statutory crime before the Revolution; that the statute had been reenacted in 1782, only two years after the state constitution was drafted; and that "no doubt, many members of the convention which framed the constitution, were members of the legislature which passed this law." The opinion continued with a close discussion of the relevant provisions of the state constitution, but Shaw's point was already made. He repeated it even more explicitly toward the end of the opinion. "[I]t is impossible to believe," Shaw concluded, that the drafters of the Massachusetts Constitution

> intended to prohibit the legislature from reenacting a law, which had been in force from the first settlement of the country, a law . . . which had hitherto been deemed essential to the peace and safety of society. The question is not, whether the makers of the constitution were right in this belief, or whether, if the constitution were now to be made, it would be wise to enlarge or restrict the powers of the legislature in this behalf; but if from the article as it stands, taken in connexion with the whole constitution, it cannot be clearly inferred that it was their intention to repeal the laws against blasphemy, and

26. *Bell v. State,* 31 Tenn. 41, 44 (1851); *Goree v. State,* 71 Ala. 7, 9 (1881); *State v. Graham,* 35 Tenn. 134 (1855); *Ex parte Delaney,* 43 Cal. 478 (1872).

27. See *Ruggles,* 8 Johns. at 294–96; *Updegraph,* 11 Serg. & Rawle at 400–3; *Chandler,* 2 Del. at 564–72.

28. 37 Mass. (20 Pick.) 206 (1838). *Kneeland* generated a large pamphlet literature at the time, much written by Abner Kneeland himself, which has been collected by Leonard Levy and published as *Blasphemy in Massachusetts: Freedom of Conscience and the Abner Kneeland Case,* ed. Leonard W. Levy (New York: Da Capo Press, 1973). For Levy's view of this "most important and colorful of all American blasphemy cases," see also *Blasphemy,* 413–23 (the quote is at page 413), and *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge: Harvard University Press, 1957), 43–58. See also Henry Steele Commager, "The Blasphemy of Abner Kneeland," *New England Quarterly* 8 (1935): 29.

> prohibit the legislature from reenacting them, then it cannot be maintained that this act of the legislature is unconstitutional and void.[29]

Thus, the Massachusetts Supreme Court was able to find a blasphemy statute constitutional by repeating the method of constitutional interpretation employed by earlier courts, but omitting any mention of the relationship between Christianity and the common law. In determining the constitutional status of blasphemy, the maxim served no necessary role.

B. Sunday Laws

But blasphemy was not the only context in which the maxim appeared. Contrary to the claims of the judges and commentators mentioned above, it popped up again and again over the course of the nineteenth century in other settings. The most important of these involved the interpretation and constitutionality of state laws prohibiting various activities on Sunday.

In the middle of the century, the maxim was cited by a series of state courts in opinions upholding the constitutionality of Sunday laws. In South Carolina, for instance, when one S. A. Benjamin—"an Israelite, [who] keeps as such the seventh day of the week, or Jewish Sabbath"—challenged the constitutionality of his prosecution for selling clothing on Sunday, the court spent the first half of its opinion explaining that Christianity was part of the common law. When the issue came up in Arkansas and New York, the opinions of the respective courts read similarly.[30]

As with the blasphemy cases, however, the maxim was entirely a matter of style; it imparted no substance to the decision. Although the relationship between Christianity and the common law was an "interesting subject," the South Carolina court admitted, "[it] was not necessary for the decision of this case; it has only been said, to prevent silence from being interpreted into a want of confidence in the proposition, that Christianity may be justly appealed to as part of our common law." In New York, the court prefaced its lengthy discussion of the maxim with this disclaimer: "The constitutionality of the law under which Lindenmuller was indicted and convicted does not depend upon the question whether or not christianity is a part of the common law of this state."[31]

We can also look at the question the other way around. In nearly every case where the issue came up, courts affirmed the constitutionality of Sunday laws.

29. 37 Mass. at 217, 221.

30. *City Council of Charleston v. Benjamin,* 33 S.C.L. (2 Strob.) 508, 509, 521–24 (1846); *Shover v. State,* 10 Ark. 259, 263 (1850); *Lindenmuller v. People,* 33 Barb. 548, 560–65 (1861). On popular support for and opposition to the Sunday laws of the period, see Richard R. John, "Taking Sabbatarianism Seriously: The Postal System, the Sabbath, and the Transformation of American Political Culture," *Journal of the Early Republic* 10 (1990): 517–67.

31. 33 S.C.L. at 522, 524; 33 Barb. at 560; see also 10 Ark. at 263–64.

In many of these cases, the maxim made no appearance at all, not even as a rhetorical flourish. At mid-century, the Pennsylvania Supreme Court, for example, managed to uphold against constitutional challenge a conviction for hauling manure on a Sunday without ever once mentioning that Christianity was part of the common law. The California Supreme Court did the same (although without the manure).[32] Later in the century, the Minnesota Supreme Court summed up a few decades of Sunday-law jurisprudence:

> In some states it has been held that Christianity is part of the common law of this country, and Sunday legislation is upheld, in whole or in part, upon that ground. Even if permissible, it is not necessary to resort to any such reason to sustain such legislation. The ground upon which such legislation is generally upheld is that it is a sanitary measure, and as such a legitimate exercise of the police power.

One might quarrel with the first sentence—the maxim in fact was *not* the ground for upholding Sunday laws, at least not in a strict sense—but the second and third accurately reflect the situation. The cases concerning the constitutionality of Sunday laws, whether or not they mentioned the maxim, generally rested on determinations that Sunday laws had been enacted to protect the public health by enforcing a day of rest, rather than for religious purposes. Thus, in South Carolina, where the Supreme Court discussed the maxim at great length, the case boiled down to the court's rhetorical question: "What has religion to do with a . . . regulation for Sunday? It is, in a political and social point of view, a mere day of rest." In Pennsylvania, where the maxim was never mentioned, the Supreme Court's rationale was just the same. "All agree," the court assumed,

> that to the well-being of society, periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed, may enjoy a respite from labor at the same time. . . . In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labour, it is not surprising that the day should have received the legislative sanction. . . . Yet it does not change the character of the enactment. It is still, essentially, but a civil regulation.[33]

32. *Specht v. Commonwealth,* 8 Pa. 312 (1848); *Ex parte Andrews,* 18 Cal. 679 (1861). *Andrews* overruled *Ex parte Newman,* 9 Cal. 502 (1858), one of the rare nineteenth-century decisions (if not the only one) to find a Sunday law inconsistent with the religion clause of a state constitution. Justice Field dissented in *Newman;* he pointed out that in every other state to consider the question, "without exception, the constitutionality of the law has been affirmed." Id. at 525. Three years later, by the time of *Andrews,* Field was the only member of the *Newman* panel left on the court. For more on these cases, see Gerald F. Uelmen, "The Know Nothing Justices on the California Supreme Court," *Western Legal History* 2 (1989): 90, 101–2.

33. *State v. Petit,* 74 Minn. 376, 379 (1898); *Moss v. State,* 131 Tenn. 94, 110 (1914); *Benjamin,* 33 S.C.L. at 529; *Specht,* 8 Pa. at 323.

In affirming the constitutionality of Sunday laws, as in affirming the constitutionality of blasphemy laws, the maxim's role was entirely ornamental.

Judges ostensibly used the maxim to *interpret* Sunday laws as well. Here again, rhetoric pushed substance aside. To demonstrate that Sunday railroad trains fell within Pennsylvania's statutory exceptions for works of "necessity" and "charity," for instance, one judge reasoned that: (1) Christianity is part of the common law of both Pennsylvania and England; (2) in England, stagecoaches and railroads run on Sundays; (3) therefore, Pennsylvania's Sunday law does not apply to train travel.[34] Step (1) of this chain is plainly not necessary. Replace it with a more timid claim—that Pennsylvania derives much of its common law from England, for example—and the argument works just as well. The same can be said of the reasoning employed in a subsequent case: (1) Christianity is part of the common law; (2) "[w]e cannot imagine in this sense anything more worldly or unreligious than the playing of professional baseball as it is played today"; (3) therefore Sunday baseball violates the statute prohibiting "worldly employment" on Sunday.[35] Here step (1) is even more irrelevant; omit it entirely, and the argument is just the same.

Litigants occasionally invoked the maxim in an effort to use a Sunday law as a defense to a cause of action arising from an event occurring on a Sunday. When a plaintiff's boat was damaged by a defendant's wrongfully constructed dam, for example, the defendant argued that the plaintiff could not recover, because he was piloting the boat in violation of the state's Sunday law. The court began by conceding the truth of one part of the defendant's argument: "The declaration that Christianity is part of the law of the land, is a summary description of an existing and very obvious condition of our institutions." Yet the maxim played no role in the decision of the case; the court refused to permit the defense, because "the penalties for carelessness and for Sabbath breaking, are totally distinct." In the same vein, when a horse-seller attempted to defend against an action for deceit on the ground that the sale occurred on Sunday, the court agreed that "[o]urs is a Christian country," but disallowed the defense for the same reason.[36]

The maxim was thus frequently invoked in cases involving Sunday laws, ostensibly as an aid to both statutory and constitutional interpretation. In none of the cases, however, did it make the slightest difference.

34. *Sparhawk v. Union Passenger Ry. Co.,* 54 Pa. 401, 432–52 (1867) (Read, J., concurring). For similar (if murkier) reasoning on a closely related issue, see *Commonwealth v. Shipley,* 35 Pa. C. 132 (1908).

35. *American Baseball Club,* 290 Pa. at 141–43 (the quote is at 141). For another irrelevant citation of the maxim in this context, see *Hudgins v. State,* 22 Ala. App. 403, 404 (1928).

36. *Mohney v. Cook,* 26 Pa. 342, 347, 349 (1855); *Melvin v. Easley,* 52 N.C. 356, 360–61 (1860).

C. Other Issues

The idea that Christianity is part of the common law found its way into opinions treating a variety of other issues, none with the frequency of blasphemy or Sunday laws. Again, in every case it was irrelevant to the outcome.

The maxim figured in two cases questioning whether a bequest to an explicitly non-Christian organization was valid under state law. The better-remembered of these is *Vidal v. Philadelphia,* a battle over the estate of Philadelphia millionaire Stephen Girard. The case turned on the validity of Girard's bequest of $2 million to the city for the creation of a school for orphans, at which "no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever." Girard's heirs (who otherwise would have taken the money), represented in the Supreme Court by Daniel Webster, argued that the bequest was void, because "the object of this bequest is against the public policy of the State of Pennsylvania, in which State Christianity is declared to be the law of the land."[37]

Justice Story's opinion for the Court accepted the premise of the argument: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania." Thus a difficult case might be posed had Girard tried to use his bequest in a manner detrimental to Christianity, such as to establish a college "for the propagation of Judaism, or Deism, or any other form of infidelity." Fortunately, Girard had done no such thing. "The testator does not say that Christianity shall not be taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college." The two were quite different, because nonecclesiastics could teach Christian doctrine equally well. "Why may not the Bible," Story asked, "and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college[?] Certainly there is nothing in the will, that proscribes such studies."[38]

Vidal, a case that received great public attention at the time,[39] was yet another instance where the maxim made an appearance but turned out to be ir-

37. 43 U.S. 127, 133 (1844); *The Writings and Speeches of Daniel Webster* (Boston: Little, Brown, 1903), vol. 11, 139.

38. 43 U.S. at 198, 199, 200. Leo Pfeffer asserts that in *Vidal,* "the Supreme Court ruled that the Christian religion is part of the common law of all the states in the Union." See Pfeffer, "Madison's 'Detached Memoranda': Then and Now," in *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History,* ed. Merrill D. Peterson and Robert C. Vaughan (Cambridge: Cambridge University Press, 1988), 283, 295. This is incorrect: *Vidal* only discussed the common law of Pennsylvania.

39. On the attention *Vidal* received at the time, see Carl B. Swisher, *The Taney Period 1836–64* (New York: Macmillan, 1974), 217; Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, 1937), vol. 2, 124–33; Robert A. Ferguson, "The Girard Will Case: Charity and Inheritance in the City of Brotherly Love," in *Philanthropy and American Society,* ed. Jack Salzman (New York: Center for American Culture Studies, 1987), 1–16.

relevant to the outcome. Whether or not Christianity was part of the common law of Pennsylvania, Girard's bequest was valid.

Later in the century, the same issue arose more starkly in a less famous case, and once again the court was able to cite the maxim without actually having to use it. *Zeissweiss v. James* involved a testator who left a bequest for the formation of an "Infidel Society" to be devoted to "the free discussion of religion, politics, &c." As in *Vidal,* the gift was challenged as contrary to state law. The court invalidated the bequest on the ground that it lacked a competent devisee, because there was as yet no Infidel Society capable of receiving the money. The court then turned to an equally circular alternative ground. The bequest could not be "sustained as a valid charitable use in this state," because "the dissemination of infidelity, which robs men of faith and hope," also robs them of charity. "It is unnecessary," the court continued, "to discuss the question under what limitations the principle is to be admitted that Christianity is part of the common law." Even in the absence of that doctrine, "a hall desecrated in perpetuity for the free discussion of religion, politics, *et cetera,* under the direction and administration of a society of infidels," could not qualify as a charity eligible to receive property under a will.[40] On their own terms, neither *Vidal* nor *Zeissweiss* rested on the maxim.

The maxim returned to the Supreme Court much later in the century, as part of Justice Brewer's familiar rhetorical flourish in *Holy Trinity,* best known for culminating in the declaration that "this is a Christian nation." The Court's opinion went through great contortions to avoid finding that a statute banning the importation of foreigners "to perform labor or service of any kind in the United States" applied to an English minister hired by a New York church. To prove that Congress could never have intended what it said, the Court looked to the statute's title, to the "evil" it was intended to correct (apparently the immigration of unskilled workers), and to the statute's legislative history, all of which provided ammunition for the desired result. The Court then turned to a demonstration that "this is a religious people" by means of evidence gleaned largely from the preambles of government documents. On top of all this, the Court piled the maxim that Christianity is part of the common law, in the form of extended quotations from *Updegraph, Ruggles,* and *Vidal.*[41]

If Christianity had not been accepted as part of the common law when *Holy Trinity* was decided, the case would not have been decided any differently. All the other reasons permitting a nonliteral reading of the statute would still have been in place. Indeed, the Court could easily have made the same "Christian nation" point without mentioning the maxim, as the various oaths and pream-

40. 63 Pa. 465, 466, 469–70, 470–71, 471 (1870).

41. *Church of the Holy Trinity v. United States,* 143 U.S. 457, 471, 458, 462–65, 465–70, 470–71 (1892).

bles and constitutional provisions would all still have been available for citation. The line between substance and rhetoric is sometimes hard to locate, but *Holy Trinity*'s invocation of the maxim is clearly on the side of rhetoric.

The remaining contexts in which the maxim was invoked can be discussed quickly. Does a father have the right to enter a church during a service and remove his teenage daughter from the congregation? No, ostensibly because "Christianity, as it is inculcated in the scriptures, is part of our common law." Is it defamatory to accuse a teacher of advocating sex education in secondary schools? No, despite the Board of Education's preference "that young children be imbued with that idea of chaste conduct which the Christian religion teaches, a religion which is part of our common law." Finally, in one of the last published cases to invoke the maxim, a trial judge enjoined a 1947 radio employees' strike in an opinion containing twelve numbered conclusions of law, the first of which was: "The Christian spirit of do unto others as you would they should do unto you, and meet your neighbor as a friend is part of the common law of the United States." At a later point in the opinion, the judge also concluded: "The Soviet power aims to turn this friendly world into a scowling world of hate." On this note, the maxim's career quietly fizzled out.[42]

From the United States Supreme Court to scattered local courts, from Kent and Story to dozens of writers no one remembers today, Christianity was generally accepted to be part of the common law. Yet in all these cases, from a lawyer's standpoint, the maxim made not the slightest bit of difference. Had Christianity *not* been understood as part of the common law, every single one of these cases would have come out the same.

II. Arguments for and against the Maxim

The maxim may not have affected the outcome of any cases, but throughout the nineteenth century it was repeatedly debated, explained, debunked, and generally treated as a subject of considerable importance. To understand why

42. *Commonwealth v. Sigman,* 3 Pa. L.J. 252, 256 (Lehigh Cty. Quarter Sessions 1843); *Snavely v. Booth,* 36 Del. 378, 388 (Del. Super. 1935); *Scranton Broadcasters, Inc. v. American Communications Assn.,* 48 Lackawanna Jurist 241, 245, 250 (1947). I have found only three later examples of purported reliance on the maxim in published opinions. In 1950, a New Jersey trial judge upheld the constitutionality of school prayer; his opinion contains a long excerpt from *Holy Trinity,* including the portion that quotes *Updegraph, Ruggles,* and *Vidal. Doremus v. Board of Education,* 7 N.J. Super. 442, 449 (1950). In 1955, a Superior Court panel in Pennsylvania cited the maxim in affirming a conviction for making obscene telephone calls. *Commonwealth v. Mochan,* 177 Pa. Super. 454, 458 (1955). And in 1958, when the same court upheld the constitutionality of a Sunday law, a dissenting judge mentioned the maxim only to suggest that it offered no support for the statute at issue. *Commonwealth v. Taber,* 188 Pa. Super. 415, 419 (1958) (Gunther, J., dissenting).

this was so, and to get a sense of why the debate ended when it did, it will be useful to look at the arguments advanced by the maxim's supporters and opponents, with attention to changes in the frequency with which particular arguments were made in particular periods.

A. Doctrinal Arguments

English and American case law. Early American writers on the subject often cited the English authorities and simply assumed that the doctrine in the United States would be the same. In the late eighteenth century, for instance, James Wilson found it sufficient to drop footnotes to Blackstone and *Woolston;* no further discussion was necessary. Early in the nineteenth century, Joseph Story took the same tack. In an entry in his commonplace book, later published as a short article, Story cited only a string of English authorities in support of the proposition that Christianity was part of the common law.[43]

As the century wore on, reliance on English authority faded out, in favor of three alternatives: (1) citation of American authority; (2) statements of public policy; and (3) explorations of the nature of the common law and its relationship to Christianity.

The first of these requires little discussion. In the early nineteenth century, all areas of the law shifted from reliance on English precedent to reliance on American precedent. The shift was largely the product of some mundane circumstances—the beginnings of published case reporters, the development of an American treatise literature, and, perhaps most important, the sheer mass of accumulating American case law, all of which caused English precedent to recede farther and farther into the background. The doctrine linking Christianity and the common law was no different from any other common law doctrine in this respect. (The second and third alternatives are worth a closer look and are considered below in sections B and C.)

State constitutions. As already noted, numerous state courts, especially in the early nineteenth century, held that the maxim had not been superseded by the religion clauses of state constitutions. This unanimity was broken in 1853 when the Ohio Supreme Court became the first court in the nation to declare that Christianity was *not* part of the common law. In a case concerning the validity of a contract made on a Sunday, the court noted that the contract would be void under English common law, in part because of the maxim. But "were such a contract void by the common law of England, it would not necessarily follow that it is void in Ohio." The clauses of the Ohio Constitution prohibit-

43. *Works of James Wilson,* vol. 2, 425 and n. 6. Story's comments were published first as Joseph Story, "Christianity a Part of the Common Law," *American Jurist* 9 (1833): 346–48, and later in *The Life and Letters of Joseph Story,* ed. William W. Story (Boston: Little, Brown, 1851), vol. 1, 431–33.

ing any religious preference meant that "neither christianity, nor any other system of religion, is a part of the law of this state." A few years later, the California Supreme Court reached a similar conclusion in invalidating the state's Sunday law. One of the concurring justices pointed out:

> We often meet with the expression that Christianity is a part of the common law. Conceding that this is true, it is not perceived how it can influence the decision of a constitutional question. The Constitution of this State will not tolerate any discrimination or preference in favor of any religion; and, so far as the common law conflicts with this provision, it must yield to the Constitution.

Three years later, the California Supreme Court, after a change in personnel, overruled its decision.[44] These two cases are, to my knowledge, the only ones in which state courts rejected the maxim for being inconsistent with the state constitution. Opposition to the maxim, particularly in the late nineteenth and early twentieth centuries, came more frequently from other sources.

B. Public Policy

Preserving public order. Throughout the maxim's entire life in American courts, from the late eighteenth century to the early twentieth century, its proponents provided instrumental arguments in its support. Most often, proponents argued that the maxim, either in itself or because of its consequences, was necessary for the preservation of public order. Less often, proponents made a similar argument, that the maxim or its consequences served to suppress vice.

The first of these arguments appeared as early as 1795, in Zephaniah Swift's explanation of why blasphemy was a common law crime. "To prohibit the open, public, and explicit denial of the popular religion of a country," Swift observed, "is a necessary measure to preserve the tranquility of a government." The argument gained additional currency when it was repeated by James Kent, who rested *Ruggles* in part on his belief that verbal attacks on Christianity "strike at the root of moral obligation, and weaken the security of the social ties." In *Chandler,* the Delaware Supreme Court likewise explained that the common law "sustained indictments for wantonly and maliciously blaspheming God, or the founder of the Christian religion, because such blasphemy tended to subvert the peace and good order which it [i.e., the common law] was bound to protect." The argument remained the same as long as the maxim was invoked. Later in the century it was repeated by Cooley and by Tiedeman, who noted that "contumely and ridicule of a prevalent religion not only offend against the

44. *Bloom v. Richards,* 2 Ohio St. 387, 391 (1853); *Ex parte Newman,* 9 Cal. 502, 513 (1858) (Burnett, J., concurring); *Ex parte Andrews,* 18 Cal. 679 (1861).

sensibilities of the believers, but likewise threaten the public peace and order by diminishing the power of moral precepts."[45]

Courts sometimes reversed the argument by emphasizing the maxim's power to prevent the spread of vice. As the Tennessee Supreme Court put it, "[r]egarding Christianity as part of the law of the land, it respects and protects its institutions, and assumes likewise to regulate the public morals and decency of the community." The law's protection of the Christian Sunday, according to another court, suppresses "a great and crying vice," one with "exceedingly deleterious effects upon the body politic." Early in the twentieth century, when the maxim was already sliding downhill, one court explained that Christianity is part of the common law because "Christianity is the purest system of morality, the firmest auxiliary and the only stable support of all human laws."[46] These sorts of instrumental arguments in favor of the maxim held steady throughout the entire period in which it was cited by courts.

Growing tolerance. The contrary public policy argument, on the other hand—that times have changed to such an extent that the maxim is no longer a necessary or legitimate way of preserving public order—exhibited a definite trend. Barely seen in the early nineteenth century, it increased in frequency in the later part and then dominated the dwindling controversy in the twentieth century. This argument rested on a set of ideas that evidently grew more widespread during this period: that the maxim arose in an era of intolerance and in a country with an established church; that neither condition holds any longer; and that there is no inconsistency between public order and religious controversy.

The point was first made (at least in a form recoverable today) by Joseph Story in his 1829 inaugural address upon his appointment as a professor at Harvard.[47] Story, although noting that "[o]ne of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the Common Law," conceded that in England the notion had been carried too far. "The error of the Common Law," Story admitted, was that it "tolerated nothing but Christianity, *as taught by its own established church,* either Protestant or Catholic; and with unrelenting severity consigned the conscientious heretic to the stake." That mistake had been corrected in the United States, as Story saw it, where now "the morals of the law are of the purest and most irreproachable character."

45. Swift, *Laws of the State of Connecticut,* vol. 2, 323; *Ruggles,* 8 Johns. at 296; *Chandler,* 2 Del. at 563; Tiedeman, *Limitations of Police Power,* 167; Cooley, *Constitutional Limitations,* 471. See Edwin S. Gaustad, "Religious Tests, Constitutions, and 'Christian Nation,'" in *Religion in a Revolutionary Age,* ed. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1994), 218–35.

46. *Bell v. State,* 31 Tenn. 41, 44 (1851); *Shover v. State,* 10 Ark. 259, 263 (1850); *Commonwealth v. Shipley,* 35 Pa. C. 132, 134 (1908).

47. The speech is reported in full in *The Miscellaneous Writings of Joseph Story,* ed. William W. Story (Boston: Little, Brown, 1852), 503–48 (the quoted material in the text is at 517; the emphasis is my addition).

Lawyers in subsequent years began applying this kind of reasoning to the maxim as a whole. In 1830, Thomas Cooper dismissed the earliest English authority for the maxim, the venerable Hale, with a Paine-like bluntness. "I have no respect for Sir Matthew Hale," Cooper announced; "he was a weak and bigoted man, deeply dyed with the legal servility of the times." Not long after, a lawyer in Pennsylvania ventured a similar argument:

> The doctrine that the "Christian religion is a part of the common law," . . . was promulgated in the worst times, and by the worst men of a government that avowedly united church and state; in times when men were sent to the block or to the stake on any frivolous charge of heresy. . . . These consequences of the doctrine were very satisfactory to the English government, in its origin. They enabled the tyrants of the fifteenth and sixteenth centuries to find a convenient excuse for sending to the block any one who became obnoxious to them.[48]

The argument was only partially successful; the court avoided mentioning the maxim, but the lawyer lost the case anyway.

It would be many years before any court would explicitly agree. Not until 1868 did any individual judge adopt this reasoning; the first was Justice Charles Doe of the New Hampshire Supreme Court, who pointed out in a dissenting opinion that "[t]he maxim, that Christianity is part of the laws of England, is a relic of the time when the clergy ruled England; when ambassadors, judges, and chief ministers of state were ecclesiastics. It is the acknowledgement of a state religion." The maxim's American history gave no greater assurance that courts should still recognize it as true: "[P]uritanism was the law of Massachusetts when Williams and Wheelwright were banished. Quakers were hung, and Quaker women were scourged through the streets of this town of Dover, under a Massachusetts law. When church and state are one, the Christianity of any sect established as the religion of the state is, to some extent, the law of the land."[49]

In emphasizing the gulf between the nineteenth-century United States and the times and places in which the maxim flourished, Cooper and Doe left the final step of the argument implicit: The policy objective originally underlying the maxim either no longer existed or was no longer served by the maxim. If the objective was understood as suppressing heresy, it had ceased to exist. If it was understood as preserving public peace, it was no longer served, in a more tolerant age, by a link between government and the majority's religion.

48. Thomas Cooper, *A Treatise on the Law of Libel and the Liberty of the Press* (1830; reprint, New York: Da Capo Press, 1970), 119; *Specht v. Commonwealth,* 8 Pa. 312, 315–16 (1848).

49. *Hale v. Everett,* 53 N.H. 1, 209 (1868) (Doe, J., dissenting). For more on Doe's 143-page dissent, see John Phillip Reid, *Chief Justice: The Judicial World of Charles Doe* (Cambridge: Harvard University Press, 1967), 238–43.

It was not until 1872 that this sort of argument was adopted by an American court in a published opinion. In explaining why an injunction could lawfully issue on a Sunday, the Illinois Supreme Court did not discuss the maxim, but had occasion to review the common law's treatment of Sunday. "The notion that Sunday is a day so sacred that no judicial act can be performed, had its origin with ecclesiastics of an unenlightened age," the court concluded. "[I]t need not have application here, in this day of thought and increased enlightenment. Men are freeer [sic] now than then, and are permitted to regard acts as innocent and harmless, which were then deemed sacreligious and worthy of anathema." Arguing to a New Jersey jury in 1888, Robert Ingersoll applied the same logic to the state's blasphemy statute, "passed hundreds of years ago, by men who believed it was right to burn heretics and tie Quakers at the end of a cart."[50]

By the early twentieth century, as the maxim slowly vanished from the case reporters, such arguments began to dominate commentary on the issue. Theodore Schroeder considered the maxim a corollary to the idea of rule by divine right; once the latter had been abandoned, the maxim was "no longer a part of the law of the land, as formerly was the case."[51] In 1918, the dean of the McGill law faculty argued that the maxim had ceased to be true because "the prevailing sentiment of today towards religion is very different from what it was two or two and a half centuries ago, and it cannot be denied, whatever legal theory may say to the contrary, that the decisions of courts of justice take their color from the tendency of the age."

Not long after, a Denver lawyer made the same point: When theological tenets are commonly accepted, it makes sense for courts to take judicial notice of them; but when they cease to be widely held, the law must change accordingly. By the middle of the century, the maxim appeared in judicial opinions primarily to be rejected for this reason. Thus in Ohio: "we are not living in the horse and buggy days nor in the days of the doctrine of hell's fire and damnation. . . . What may have been good law in the early 1800's is archaic today." In New York: "In those days it was held 'Christianity and conscience are parts of the common law.' . . . It seems that we have come a long way." In Pennsylvania: "would anyone question the bathing attire of today as being stamped as immoral in 1794? Would modern dancing have been considered as debauching the mind and corrupting the morals?"[52]

50. *Langabier v. The Fairbury, Pontiac and Northwestern R.R. Co.,* 64 Ill. 243, 247 (1872); Robert G. Ingersoll, *Trial of C. B. Reynolds for Blasphemy* (New York: C. P. Farrell, 1888), 12.

51. Theodore Schroeder, *Law of Blasphemy: The Modern View Exhibited in Model Instructions to a Jury* (New York: Free Speech League, 1919), 5–6; see also Theodore Schroeder, *Blasphemy and Free Speech* (New York: Free Speech League, 1918), 355–56.

52. R. W. Lee, "The Law of Blasphemy," *Michigan Law Review* 16 (1918): 149, 151; Frank Swancara, *Obstruction of Justice by Religion* (Denver: Courtright Publishing, 1936),

The public policy arguments for and against the maxim thus exhibited contrary tendencies over time. The argument in favor—that the maxim was necessary to preserve public order—held steady over the maxim's active life in the courts, a period roughly coterminous with the nineteenth century. The argument against—that the maxim no longer served any legitimate policy goal, but was directed toward an objective whose relevance had disappeared—was made only in a weak form in the first half of the nineteenth century, gained force in the second half, and then became the primary way lawyers dealt with the issue in the twentieth century.

At this point, we can venture a partial explanation for the maxim's history in the courts. As the number of religious denominations in the United States multiplied, people's expectations shifted from social uniformity to diversity. In balancing the interests of the majority against those of dissenters, the scale began to tip toward the latter.[53] This shift accounts in part for the death of the notion that Christianity is part of the common law.

The maxim, however, is made up of two concepts—Christianity and the common law—attitudes toward both of which were changing over the nineteenth century.

C. The Common Law

Arguments on both sides of the question rested, often implicitly, on the writer's conception of the common law. As notions of the common law slowly altered over the course of the nineteenth century, so did attitudes toward the maxim.

Custom and natural justice. In the early and middle parts of the nineteenth century, the maxim was often supported with two related arguments about the nature of the common law.

First, it was argued that the common law was derived from Christian principles. Story, for instance, located Christianity as "lying at [the] foundations" of the common law and cited a few examples of what he meant (although with pronouns that obscured his meaning):

229; *Ohio v. Woodville Appliance,* 13 Ohio Op. 2d 46, 48 (1960); *Romeo v. Union Free School District No. 3,* 368 N.Y.S.2d 726, 731 (Sup. 1975); *Commonwealth v. Taber,* 188 Pa. Super. 415, 422 (1958) (Gunther, J., dissenting).

53. Roger Finke and Rodney Stark, *The Churching of America, 1776–1990* (New Brunswick: Rutgers University Press, 1992); Nathan O. Hatch, *The Democratization of American Christianity* (New Haven: Yale University Press, 1989); Robert C. Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment," *California Law Review* 76 (1988): 297, 306–24. One crude indicator of early movement in this direction is the gradual disestablishment of churches by state governments in the late eighteenth and early nineteenth centuries. See Leonard W. Levy, *The Establishment Clause,* 2d ed. (Chapel Hill: University of North Carolina Press, 1994), 27–78.

> It [the common law] repudiates every act done in violation of its [Christianity's] duties of perfect obligation. It [the common law] pronounces illegal every contract offensive to its [Christianity's] morals. It [the common law] recognizes with profound humility its [Christianity's] holidays and festivals, and obeys them as *dies non juridici.* It [the common law] still attaches to persons believing in its [Christianity's] divine authority the highest degree of competency as witnesses.

The argument was repeated a few times at mid-century. The Delaware Supreme Court cited Christianity as "the foundation" of both the state's constitution and "many of the principles and usages, constantly acknowledged and enforced, in the Courts of justice." The Georgia Supreme Court referred to the Bible as "the foundation of the Common Law." John Pomeroy explained to students that "the English law, from the first, powerfully felt the animating influence of the Christian religion. An impetus was imparted, a direction given, which have never been lost. To this primitive origin, we must refer the fact, stated by some writers, that Christianity is part of the common law of England." Thomas Cooley, in a treatise otherwise quite skeptical about the maxim, conceded that "[t]he best features of the common law . . . have either been derived from, or have been improved and strengthened by, the prevailing religion and the teachings of its sacred book."[54] After the 1860s, however, this argument no longer appears.

Also common at mid-century was a related argument comprised of three steps: (1) the common law is nothing more than custom or natural justice; (2) the principles of Christianity are customary, or are consistent with natural justice; (3) therefore Christianity is encompassed by the common law. The argument rests on a nonpositivist (or, in retrospect, a prepositivist) view of the common law. To make this argument, one has to understand the common law as having an existence independent of the statements of judges. The common law has to be drawn from a range of sources much wider than the commands of authorized government officials.

In *Updegraph,* the Pennsylvania Supreme Court made this point about as clearly as it can be made. "Christianity is part of the common law of this state," the court began. "It is not proclaimed by the commanding voice of any human superior, but expressed in the calm and mild accents of customary law. Its foundations are broad and strong, and deep; they are laid in the authority, the interest, and the affections of the people." When Daniel Webster argued to the Supreme Court that "Christianity is part of the law of the land," he supported his claim along the same lines, with a vision of a common law drawn from popular practice rather than judicial decree:

54. *Miscellaneous Writings of Joseph Story,* 517; *City Council v. Benjamin,* 33 S.C.L. 508, 521 (1846); *Wylly v. Collins,* 9 Ga. 223, 237 (1851); John Norton Pomeroy, *An Introduction to Municipal Law* (New York: D. Appleton & Co., 1865), 193; Cooley, *Constitutional Limitations,* 472.

> *Every thing declares it.* The massive cathedral of the Catholic; the Episcopalian church, with its lofty spire pointing heavenward; the plain temple of the Quaker; the log church of the hardy pioneer of the wilderness; the mementoes and memorials around and about us; the consecrated graveyards, their tombstones and epitaphs, their silent vaults, their mouldering contents; all attest it. *The dead prove it as well as the living.* The generation that are gone before speak to it, and pronounce it from the tomb. We feel it. All, all, proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and the fagot are unknown, general, tolerant Christianity, is the law of the land.

Other courts and commentators, with less eloquence than Webster, made the same point. One judge explained the maxim on the ground that Christianity is so "involved in our social nature" that one "cannot possibly get clear of its influence, or reject those sentiments, customs, and principles which it has spread among the people, so that, like the air we breathe, they have become the common stock of the whole country, and essential elements of its life." One commentator likewise supported the maxim with the observation that Christianity is "closely interwoven into the texture of our society, and is intimately connected with all our social habits and customs, and modes of life." Again, this is an argument common at mid-century but almost never seen thereafter.[55]

The reasoning sounds imprecise to modern ears—at its best, in Webster's words, it resembles Fourth of July rhetoric rather than sharp legal argument—because it proceeds from a view of the common law that we no longer possess. It assumes a world in which judges discover the law rather than make it, that court decisions are only "[t]he best evidence of the common law" but not the common law itself. The argument makes sense only if the common law is derived from the larger world outside the legal system, from the customs and the intuitive sense of justice possessed by lawyers and nonlawyers alike. It assumes a world in which intelligent lawyers could, without controversy, say something like this:

> We live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet it when we wake and when we lay down to sleep, when we travel and when we stay at home; it is interwoven with the very idiom that we speak, and we cannot learn another system of laws without learning at the same time another language. We cannot think of right or of wrong but through the medium of ideas that we have derived from the common law.[56]

55. *Updegraph,* 11 Serg. & Rawle at 406; *Writings and Speeches of Daniel Webster,* vol. 11, 176 (emphasis in original); Mohney v. Cook, 26 Pa. 342, 347 (1855); Sedgwick, *Statutory and Constitutional Law,* 17–18 (1857). The only instance discovered of this argument having been made after the 1850s is in Aldrich, "Christian Religion and Common Law," 26–29.

56. James Kent, *Commentaries on American Law,* 2d ed. (New York: O. Halsted, 1832), vol. 1, 473; Peter S. Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (1824; reprint, New York: Arno Press, 1972), 91.

Where the common law has this sort of existence independent of the statements of judges, it can include systems of thought otherwise external to the legal system without causing any tension. If the common law can be found in our architecture, in our dreams, in our manner of speech—and especially in our prerational judgments as to right and wrong—then there is nothing mystical about the notion that the common law incorporates Christianity. *Any* set of principles pervasive enough to color the thoughts and practices of the overwhelming majority of the population would be part of the common law, because the common law is itself nothing more than those same thoughts and practices, worked out in a systematic form.

Christianity was not the only system of principles ubiquitous enough to qualify. In the early part of the nineteenth century it was "a current phrase among the special pleaders" that "the almanac is part of the law of the land."[57] The almanac, like Christianity, comprised a set of propositions as to which there was near-universal assent—that a certain day was a holiday, for instance. The common law, understood as something drawn from the practices of day-to-day life, could thus incorporate the almanac, which was, after all, a register of a subset of those practices.

In the late twentieth century, Christianity no longer commands unanimity, but the almanac still does, and our legal system still incorporates it. We describe that process of incorporation differently, however. We no longer say that the almanac is part of the common law; instead, we might say that a judge may take judicial notice that a certain day is a holiday. The effect is exactly the same—in both cases, the judge might accordingly give no credence to a pleading asserting that a given event occurred on a particular day, if such an event can never occur on a holiday—but our conception of the sources of the common law has narrowed to the point where we have had to change our vocabulary.

The class of organized sets of principles that were both (1) as pervasive and agreed-upon in the early nineteenth-century United States as Christianity or the almanac, and (2) likely to figure in litigation, is obviously a very small one. Newtonian mechanics is one candidate. An early nineteenth-century judge could have said that the Law of Gravity is part and parcel of the common law, in a case where gravity made a difference, although to my knowledge none did. The possibility, at least, was recognized by the law student Thomas Jefferson in the 1760s, who sarcastically noted in his commonplace book: "We

57. On the phrase's currency, see *Chandler,* 2 Del. at 562. For the phrase itself, see Joseph Chitty, *A Practical Treatise on Pleading* (New York: R. M. M'dermut, 1809), vol. 1, 220. The analogy is inexact at its root—Chitty goes on to explain that the almanac is part of the law of the land because it has "been established by different statutes." Ibid. But the statutes were English, while Chitty's phrase was nevertheless current among lawyers in Delaware, who most likely picked it up from one of Chitty's American editions.

might as well say that the Newtonian system of philosophy is a part of the common law, as that the Christian religion is."[58]

The maxim that Christianity is part of the common law thus rested in part on an understanding of the common law widely held in the early nineteenth century—that the common law had an existence independent of the statements of judges (that it was *discovered,* not made), and that the sources of the common law accordingly extended well beyond the confines of the legal system. This sort of argument in support of the maxim was made a few times at mid-century, but it drops out of the case reporters entirely after the 1850s.

Judge-made law. Arguments *against* the maxim, meanwhile, often proceeded from a different understanding of the common law, one based on the modern assumption that it has no existence independent of the statements of judges, and that judges accordingly *make* the common law when they decide cases.[59] The frequency with which this argument was made reversed the trajectory of the opposite argument. It began in a trickle in the early part of the nineteenth century, in a half-realized form, but then in the second half of the century increased both in frequency and in fullness.

A few early nineteenth-century writers, most notably Thomas Jefferson, argued against the maxim on the ground that it had been fabricated by English judges, and that Christianity was thus not *really* part of the common law. This theme was a bee in Jefferson's bonnet from his law student days right up to his death sixty years later. As a student, he was already complaining that the maxim owed its existence to a mistranslation from law French into English. Chief Justice Prisot, discussing in 1458 the extent to which a common law court was obliged to respect ecclesiastical law, had explained that "A tiels leis que ils de seint eglise ont en *ancien scripture,* covient a nous a donner credence." In 1613, Henry Finch translated that line as "To such laws of the church as have warrant in *Holy Scripture,* our law giveth credence." In fact, Jefferson argued, "ancien scripture" meant *ancient writing,* not holy scripture; Prisot had meant to incorporate into the common law only the oldest written laws of the church, not the Bible. Jefferson pointed out how subsequent English writers had cited Finch as authority. Eventually this chain of authority gets to Hale and *Taylor;* Jefferson implied that Hale had either come up with the doctrine on his own—the product of "his bigotry, his supersititions, his visions about sorceries, demons, etc."—or had taken it, without ever saying so, from the line of authority initiated by Finch. "[W]e detect" these English judges, conclud-

58. Jefferson to Thomas Cooper, Feb. 10, 1814 (quoting an entry Jefferson says he made in his commonplace book "half a century ago"), *The Writings of Thomas Jefferson* (Washington: Thomas Jefferson Memorial Assn., 1905), vol. 14, 93.

59. Daniel R. Ernst, "Church-State Issues and the Law: 1607–1870," in *Church and State in America: A Bibliographical Guide: The Colonial and Early National Periods,* ed. John F. Wilson (Westport: Greenwood Press, 1986), 337–39.

ed Jefferson, "endeavoring to make law where they found none, and to submit us at one stroke to a whole system, no particle of which has its foundation in the common law." He was confirmed in this opinion by a review of the relevant early English history. The common law was introduced by the Saxons when they settled in England in the fifth century; Christianity was not introduced until the seventh century; "[h]ere, then, was a space of two hundred years, during which the common law was in existence, and Christianity no part of it." Jefferson then reviewed "the laws of the period" from the introduction of Christianity forward, and observed that "none of these adopt Christianity as part of the common law." Jefferson concluded: "[W]e may safely affirm (though contradicted by all the judges and writers on earth) that Christianity neither is, nor ever was a part of the common law."

Jefferson returned to this argument as an old man, but with a greater indignation; what was once an inadvertent mistranslation became an intentional grab for power. He complained to John Adams: "Our judges, too, have lent a ready hand to further these frauds, and have been willing to lay the yoke of their own opinions on the necks of others; to extend the coercions of municipal law to the dogmas of their religion, by declaring that these make a part of the law of the land." To Thomas Cooper he described "the pious disposition of the English judges, to connive at the frauds of the clergy."[60] Jefferson's views on the subject became public knowledge a couple of years before his death, when his letter to the octogenarian English reformer John Cartwright was published in the *London Nation* and the *Boston Daily Advertiser.* Repeating the Prisot-Finch-Hale story, Jefferson (by now also an octogenarian) decried a "judiciary usurpation of legislative powers" and concluded: "What a conspiracy this, between church and state!!! Sing tantararara, rogues all; rogues all; sing tantararara, rogues all!"[61] The argument in Jefferson's commonplace book, slightly revised by Jefferson, would eventually be published posthumously. From the grave, he got one last shot in: The notion that Christianity is part of the common law was "the most remarkable instance of Judicial legislation, that has ever occurred in English jurisprudence, or perhaps in any other."[62]

Jefferson's argument was picked up in subsequent years by radicals on both sides of the Atlantic. In the United States, Thomas Cooper accused Hale of "bigoted stupidity" in asserting Christianity to be part of the common law; Cooper found Hale guilty of either "gross and culpable negligence" or "gross and culpable ignorance." In England, George Holyoake argued that "the un-

60. Jefferson to Cooper, Feb. 10, 1814, *Writings,* 86–91; Jefferson to John Adams, Jan. 24, 1814, ibid., 73.

61. The letter is reprinted as Appendix III to Cooper, *Law of Libel;* the quoted material is at 182 and 184.

62. Thomas Jefferson, *Reports of Cases Determined in the General Court of Virginia from 1730, to 1740; and from 1768, to 1772* (1829), p. vi, 137–42.

supported dictum of a judge in the middle of the seventeenth century cannot be construed as a part of the ancient writings of the common law. Either the law already existed or it did not. If it did, the question is—where is it? If it did not, Chief Justice Hale could not then make it for the first time."[63]

This argument was frequently opposed at the time, most strenuously by Story, and has had supporters and opponents among commentators ever since.[64] For our purposes, the interesting point is the half-positivism lurking just beneath the surface of the argument. For Jefferson and his followers, the common law was a body of doctrine separate from daily popular practices, separate from conventional morality. Christianity might be the community's religion, and Christianity might pervade every aspect of ordinary life, but that alone was not enough to make Christianity part of the common law. Something more was required before nonlegal doctrine could be said to have become law.

Jefferson and his followers were not yet at the point of declaring that judges themselves make the common law. Thus, they were walking an infinitesimally thin ledge between two competing understandings of the common law. On the one hand, as we have seen, with a broad view of the sources of the common law, one can decide that Christianity either is or is not sufficiently intertwined with customary notions of right and wrong to be considered part of the common law. On the other hand, as discussed below, with the narrower modern view that the common law is made by judges, one can decide whether or not Christianity is properly part of the common law by determining whether past judges interpreted precedent (or made policy, or acted however one assumes a judge to act) in accordance with whatever professional norms one prefers.

But Jefferson and his followers were at an uneasy halfway point. They implicitly rejected the notion that popular practice automatically becomes part of the common law. But they did not yet believe that judges make the common law themselves—in fact, they were quite upset at Hale for doing exactly

63. Cooper, *Law of Libel,* 120; George Jacob Holyoake, *The History of the Last Trial by Jury for Atheism in England: A Fragment of Autobiography* (1851; reprint, New York: Arno Press, 1972), 54.

64. For Story's rebuttal to Jefferson, prompted by the 1824 publication of Jefferson's letter to Cartwright, see Story, "Christianity a Part of the Common Law"; Story to "Mr. Professor Everett," Sept. 15, 1824, *Life and Letters,* 430; *Miscellaneous Writings,* 517 (the 1829 Harvard speech). Story mentioned Jefferson by name in the article and the letter; in the speech, he referred only to "the specious objection of one of our distinguished statesmen." For another near-contemporary response to Jefferson, see *State v. Chandler* (whose full name, incidentally, was Thomas Jefferson Chandler), 2 Del. at 558. For twentieth-century support, see Edward Dumbauld, *Thomas Jefferson and the Law* (Norman: University of Oklahoma Press, 1978), 76–82; Franklin Steiner, *Religious Treason in the American Republic* (Chicago: American Rationalist Assn., 1927), 33; *Levering v. Ennis* (Superior Court, Baltimore, 1932), reported in *American State Papers and Related Documents on Freedom in Religion,* 4th rev. ed. (Washington: Religious Liberty Assn., 1949). For half-support, see Levy, *Blasphemy,* 409. For opposition, see Nokes, *Crime of Blasphemy,* 54–55.

that. They adhered instead to the older idea that the common law had an independent existence and could be discovered by judges. This posed a dilemma. If the content of the common law came neither from popular practice and intuitive justice nor from the commands of judges, from what exactly did it come? With neither source permissible, the common law should have no content at all. Jefferson avoided this conclusion by pushing the problem into the distant past and accepting as legitimate whatever could be shown to have been part of the common law in the fifth century. But this technique causes difficulty as well. The argument succeeds in proving that Christianity could not be part of the common law because it was not yet incorporated in the fifth century. But this means that no doctrine could have become part of the common law at any time after the fifth century. Hale either had to cite precedent for the maxim or be accused of fabricating nonexistent law; in Jefferson's logic, the common law lacks the ability to change over time by accreting new doctrine, whether from the wider world or the judge's own will.

Later in the century, as opponents of the maxim became more willing to let go of the older conception of the common law, this dilemma evaporated. Lawyers became more explicit in their understanding of law as a body of doctrine completely distinct from other bodies of doctrine. Accordingly they also became more insistent on the idea that Christianity could be part of the common law only to the extent that Christian principles had been incorporated into the common law by *judges.* One gets an early sense of this new separation of law from other walks of life from John Cartwright's opposition to the maxim in England: "Is *Philosophy,* is *Science* in its infinity of ramifications, 'part and parcel' of our law, because we have laws that *speak of them?*—Or *Painting,* or *Sculpture,* or *Landskip Gardening,* or other matters of Taste?—Was *Witchcraft,* because once believed in by Legislators and Judges, 'part and parcel' of our Law, in the sense of late absurdly maintained?"

By the second half of the century, the argument had become commonplace. "[I]t cannot be argued," Charles Doe observed in 1868 (although it certainly had been for many years before), "that a particular system of theology is established as law, by a mere effort to preserve peace and order through police regulations adapted to the actual condition of the people by whom that theology is, in fact, generally accepted." Thomas Cooley, writing in the same year, agreed. "Christianity," he concluded, "is not a part of the law of the land, in the sense that would entitle the courts to take notice of and base their judgments upon it, except so far as they should find that its precepts had been incorporated in, and thus become a component part of, the law."[65] As with Jefferson, the pervasiveness of Christianity was no longer enough to make it part of the common law. But where Jefferson left no room for Christianity, or any

65. John Cartwright, *The English Constitution Produced and Illustrated* (London: R. Taylor, 1823), 391; *Hale,* 53 N.H. at 203; Cooley, *Constitutional Limitations,* 472.

doctrine, ever to become part of the common law, Doe and Cooley did. Any given Christian doctrine could become part of the common law if it was explicitly recognized as such. Left implicit, but capable of being inferred (particularly from Cooley's comments), was that the required recognition could come from common law judges. In doing so, of course, judges would be exercising a degree of free choice denied them under the older conception of the common law; they would, in effect, be making law.

The positivist argument against the maxim grew more explicit in subsequent years. Toward the end of the century, a Baltimore lawyer conceded that "Christianity permeates everywhere among us, and plays a part in everything we do." But the ubiquity of Christianity bore no relation to the content of the common law, which was a matter only for "express judicial settlement." To say that Christianity is "part of the common law of this country," a court observed in the early twentieth century, "and use it in a rhetorical or literary or poetical sense, I say yes, and we might say the same thing about the Laws of Moses, and about the Hindu law, and about the leading principles of a great many of the ancient writers." But Christianity was emphatically "not part of the common law . . . as a *legal* proposition."[66]

Meanwhile, a related argument, first formulated in the mid-nineteenth century, gained currency as the century progressed. It proceeded from an assumed definition of "law" limited to only those rules backed by some sanction from the state. To say that Christianity was part of the common law, the argument went, implied that judges had to have the power to evaluate the correctness of religious belief, and that the state had to stand ready to enforce those determinations. Since those implications were empirically false—no American government decided religious questions or enforced religious orthodoxy—Christianity could not be part of the common law.

The earliest suggestion of this line of thought appeared in an argument before the Pennsylvania Supreme Court in 1848. A lawyer ridiculed the maxim by asking: "If this doctrine is to be the rule of action, where do you find its interpretation? Where are to be found adjudged decisions of what this law teaches, so that the people may escape the perils of its violation?" The point was made more clearly two years later in the opinion of a New York court:

> If Christianity is a municipal law, in the proper sense of the term, as it must be if a part of the common law, every person is liable to be punished by the civil power who refuses to embrace its doctrines and follow its precepts; and if it must be conceded that in this sense the maxim is untrue, it ceases to be intelligible, since a law without a sanction is an absurdity in logic and a nullity in fact.

66. James T. Ringgold, *The Legal Sunday: Its History and Character* (Battle Creek, Mich.: International Religious Liberty Assn., 1894), 135, 139; *Levering v. Ennis* (emphasis in original), *American State Papers,* 569–70.

The same point was made twice by Charles Doe in the following decade. Doe first gave the argument directly:

> The court are authorized to determine all the principles of the common law in force in this state; the court are not authorized to determine a single principle of Christianity; therefore, in contemplation of law, the principles of Christianity are no part of the principles of the common law. If Christianity were in any sense, theoretically or practically, a part of the common law of New Hampshire, it would be the right and duty of this court to decide what Christianity is, and to enforce it as law, and as other laws are enforced, by the whole power of the state placed in our hands for the purpose.

Doe then gave the same argument indirectly in the form of a revealing joke: "When some one remarked, 'Christianity is part and parcel of the law of the land,' Rolfe said to me, 'were you ever employed to draw an indictment against a man for not loving his neighbor as himself?' "[67]

Toward the turn of the century, this method of attacking the maxim became commonplace. The Ohio Supreme Court observed that "[i]f Christianity is a law of the state, like every other law, it must have a *sanction.* Adequate penalties must be provided to enforce obedience to all its requirements and precepts. No one seriously contends for any such doctrine." Commentators agreed.[68] Because the concept of law made no sense without government enforcement, and because courts were not in the business of enforcing the principles constituting Christianity, Christianity could not be part of the common law.

This thinking rests on a distinctly modern understanding of the common law, but in a slightly different sense from the one already discussed. Law was a body of principles separate from other bodies of principles, not just in its source (the decisions of government officials), but in its field of application. Religious norms, even those universally subscribed to, did not qualify as "law," not just because they were not *made* by government officials, but also because they were not *enforced* by government officials. By the end of the nineteenth century, conventional thought about the domain of the common law had narrowed in both senses.

We can now add the second half of an explanation for the maxim's demise at the turn of the century. There was sufficient change in conventional professional attitudes toward the common law over the course of the century that the maxim no longer made sense by the century's end. When the common law is drawn from a wide range of sources external to the legal system, and when

67. *Specht,* 8 Pa. at 316; *Andrew,* 6 N.Y. Super. at 182; *Hale,* 53 N.H. at 202, 210 (Doe, C.J., dissenting) (quoting Henry Crabb Robinson's Diary [American ed., Boston: Fields, Osgood, 1869], vol. 1, 353).

68. *Board of Education of the City of Cincinnati v. Minor,* 23 Ohio St. 211, 247 (1872) (emphasis in original); see Barber, "Christianity and the Common Law," 267; Ringgold, *The Legal Sunday,* 135.

law need not imply the existence of government enforcement, Christianity can be part of the common law. But when the common law is made, not discovered, by judges, and when law is understood to incorporate the idea of government sanction, the statement that Christianity is part of the common law ceases to be intelligible.

This double shift in the profession's conception of the common law is, of course, a familiar story.[69] Depending on one's general views as to how such changes occur, one might describe the change either as the influence of Austin or as a more amorphous shift in the professional climate, of which Austin is only the best-remembered proponent.[70] Either way, this gradual change in opinion about the common law, combined with the equally gradual change in conventional attitudes toward religion, accounts for the quiet abandonment around the turn of the century of the idea that Christianity is part of the common law. The force of stare decisis kept the maxim limping along for another few decades, but the damage had already been done.

For this reason, the maxim's decline serves as a rough barometer of the change in general thought about the common law, a change that is otherwise quite difficult to track. Part of the difficulty lies in the relative paucity of explicitly jurisprudential writing in the nineteenth-century United States, particularly in the early part of the century. Legal writers adopted forms of discourse more immediately useful to practicing lawyers; such treatises and practice manuals tended not to address issues as broad as the nature of the common law. It was likewise unusual for judges deciding cases, or lawyers arguing before them, to have occasion to discuss the nature of the common law generally. As a result, the mechanics of this change in thought are largely hidden from view; like other fundamental changes in legal thought before the late nineteenth century, they can be found only by rummaging through masses of opinions and arguments.

The problem is exacerbated by the nature of the question. Professional norms limit what judges can say in opinions and what lawyers can argue in an effort to

69. Like most legal changes, this story is most familiar at the top. Compare *Swift v. Tyson,* 41 U.S. 1, 18 (1842), with *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not some brooding omnipresence in the sky but the articulate voice of some sovereign"); *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.,* 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting); and *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938).

70. At the very least, one finds in Austin the first systematic exposition widely read in the United States of these two points, that the common law is made, not discovered, by judges, John Austin, *Lectures on Jurisprudence,* 3d rev. ed., ed. Robert Campbell (London: J. Murray, 1869), vol. 2, 655, and that law implies government sanction, ibid., vol. 1, 92–94. On Austin's influence in the United States, see Richard A. Cosgrove, *Our Lady the Common Law: An Anglo-American Legal Community, 1870–1930* (New York: New York University Press, 1987), 110–27.

persuade judges. In particular, the fiction that the common law is discovered, not created, by judges so strongly underlies conventional norms concerning judicial power that one rarely sees an opinion explicitly rejecting it. This is true even now, when the fiction is generally recognized as such.[71] It must have been all the more true in the nineteenth century, when the truth of the proposition was still being defended. A statement in an opinion that the common law exists independently of the decisions of judges is thus a statement that cannot be taken at face value; in his heart, the judge may believe the contrary, but the unwritten norms of professional discourse prevent him from saying so.

The decline of the idea that Christianity is part of the common law, to the extent it followed from changing ideas about the common law, thus serves as a window onto the broader shift in the professional intellectual climate. In their acceptance or rejection (or omission) of the maxim, nineteenth-century judges revealed their understandings of the common law in general.

III. Conclusion

One question remains.[72] Why would nineteenth-century judges and lawyers spill so much ink over a doctrine that had no effect on the outcome of any decided cases?

Much of the attention to the maxim is doubtless attributable to its seeming fundamentality. Whether or not the maxim actually *was* important, its wording made it *sound* important. It would be hard to find two systems of thought more basic to the worldview of nineteenth-century American lawyers than Christianity and the common law. Whether one was part of the other must have seemed like a basic question that needed answering. After all the fuss, it is fair to wonder whether the question would even have arisen had Hale used less memorable wording back in 1676.

Once the maxim assumed its place in the culture, we may, no doubt, attribute some of its subsequent appearances to simple sentimentality. Whether or not it made any difference that Christianity was part of the common law—in fact, particularly *because* it made no difference—it must have felt nice to a Christian judge to repeat the maxim. Readers of today's appellate opinions will be

71. See, e.g., *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment, "I am not so naive [nor do I think our forebears were] as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it,* which is to say *as though* they were 'finding' it—discerning what the law *is,* rather than decreeing what it is today *changed to,* or what it will *tomorrow* be").

72. To be precise, one of which space will permit discussion. Attributing the death of the maxim to broader changes in thought about religion and law naturally causes one to ask why *those* changes occurred, but intelligent answers to those questions, if I had them, would be far longer than this article.

familiar with similar Mom-and-apple-pie slogans, equally devoid of consequence—the law is a seamless web; prosecutors have an obligation to seek justice; and so on.

On the other hand, particularly in the more emphatic statements of the maxim, one senses an undercurrent of fear. Judges would not go out of their way to explain that Christianity was part of the common law, in cases where they conceded that the maxim made no difference, unless they were afraid that there were readers who might disagree. The attention given to the maxim may have grown from a vague feeling, otherwise untranscribed, among some mid-nineteenth-century judges that religion was losing its accustomed place in public life. Guessing at the unstated motivations of appellate judges is always a tricky business, in that assertions can never be empirically tested, but given that limitation, the maxim's life in nineteenth-century American courts may reflect a wider uneasiness about the changing relationship between law and religion.

We might also consider Anglo-American opinion writing with its tendency to perpetuate verbal formulae long after they have ceased to serve their original purpose. In a legal world where jurisdiction was divided between secular and ecclesiastical courts, Hale's maxim had a point; it explained why blasphemy was not just a matter for the ecclesiastical courts. The maxim lost this function when transposed to North America, where ecclesiastical courts did not exist. But it lived on in the writings of judges and lawyers, people professionally trained to recycle stock phrases without too much thought about their content.

That judges and lawyers would argue over a maxim with no impact in the wider world may also be attributed to the general character of legal disputes. The maxim was not a doctrine so much as a meta-doctrine, that is, a proposition *about* legal doctrine. If legal doctrines are those rules purporting to govern actual behavior (for instance, the rule forbidding the ridicule of Christianity), meta-doctrines are rules purporting only to govern a set of doctrines. It may be helpful, in this sense, to think of the maxim as a nineteenth-century analogue of some familiar meta-doctrinal propositions of today—that the language of statutes or contracts can or cannot convey specific meaning, for example, or that the common law is or is not generally efficient. These meta-doctrinal propositions *never* affect the outcomes of cases, at least not in any observable sense. As statements about rules rather than statements about actual conduct, they affect case outcomes only indirectly, by limiting or expanding the range of conceivable doctrines a judge might implement.

Although propositions like the maxim may never directly affect the outcomes of cases, they are often the subject of argument. Yet the argument is different from an ordinary dispute over legal doctrine. Sometimes many nonlawyers are even more interested than lawyers in doctrinal disputes, simply because they are people whose behavior will be affected by the outcome. But it is very hard to come up with any meta-doctrinal disputes that have spilled beyond the

confines of the legal community. This category of arguments may simply be too far removed from the interests of nonlawyers to attract much attention.

The debate over the maxim fits this pattern. The maxim apparently never attracted much interest from nonlawyers, on either side of the debate. Whether or not Christianity was part of the common law was a question that engaged primarily lawyers, who argued largely in fora—judicial opinions, legal treatises, articles in legal periodicals, speeches before legal audiences—where the audience was primarily other lawyers. The debate over the maxim was purely internal.

This observation prompts a more general suggestion about legal disputes. Whether at the level of meta-doctrine or doctrine itself, the less a legal dispute affects the outcomes of actual cases, the more internal it is likely to be, simply because nonlawyers will have less at stake (and thus less of an interest) in how it is resolved. The distinction between doctrinal and meta-doctrinal disputes is only an especially easy case, easy because meta-doctrinal disputes are *always* less likely than doctrinal disputes to have an effect on actual behavior.

Because the debate over the maxim (1) engaged only lawyers and (2) had no effect on any actual cases, we can correct some of the historiographical errors mentioned at the outset. It is unlikely that lawyers advanced the theory that Christianity is part of the common law (as Perry Miller suggests) as a means of justifying the law to *nonlawyers.* It is far more likely that lawyers were justifying their existence to themselves, or to their colleagues, although from the documentary record there is no defensible way of guessing the extent to which this was true. It is misleading to say (as Mark Howe does) that many cases were controlled by the maxim. At least as lawyers would use the word "controlled" in this context, *no* cases were controlled by the maxim. It is equally misleading to call the maxim (as Merrill Peterson calls it) the "cornerstone" of any broader conception of the relationship between church and state. No doubt it was part of a larger cluster of ideas about law and religion. But if one has to decide which ideas rested upon which, the maxim was more of a stone somewhere near the top; it stayed in place so long as it was supported by one conception of the church-state relationship and one conception of the common law, but when these were replaced by other conceptions, the maxim crumbled.